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No. (1)

Supreme Court, U.S.
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In The

Supreme Court of the United States

BLANCA PIEDAD ORTIZ,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Where the Eleventh Circuit refused to grant a certificate of appealability ("COA") on petitioner Ortiz' claim of ineffective assistance of counsel with respect to a pre-trial plea offer but, instead, proceeded to hold that Ortiz' protestations of innocence at trial foreclosed a demonstration of prejudice – even though decisions from other circuits hold to the contrary – should this Court ensure adherence to its COA rules by issuing a GVR directing the Eleventh Circuit to issue the requested COA and, thereafter, to conduct a full examination of the merits of petitioner's constitutional claim?

INTERESTED PARTIES

There are no parties to the proceeding other than those named in the caption of the case.

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PETITION FOR WRIT OF CERTIORARI

Petitioner Blanca Piedad Ortiz respectfully petitions for a writ of certiorari to review the decision of the United States Court of Appeals for the Eleventh Circuit denying her motion to expand the certificate of appealability, rendered and entered in Case No. 05-15798-A in that court.

OPINIONS BELOW

The Orders of the United States Court of Appeals for the Eleventh Circuit denying petitioner's motion to expand the certificate of appealability (App. 1, *infra*), and denying her motion for reconsideration (App. 43, *infra*) are both unreported. The Orders of the United States District Court granting in part and denying in part petitioner's motion for a certificate of appealability (App. 39, *infra*), and adopting the report and recommendation of the United States Magistrate Judge (App. 5, *infra*), are also unreported. Finally, the Report and Recommendation of the United States Magistrate Judge (App. 8, *infra*), is also unreported.

STATEMENT OF JURISDICTION

Jurisdiction of this Court is invoked under 28 U.S.C. §1254(1) and Part III of the Rules of the Supreme Court of the United States. *See also Hohn v. United States*, 524 U.S. 236, 253 (1998) (Supreme Court "has jurisdiction under §1254(1) to review

denials of applications for certificates of appealability by a circuit judge or a panel of a court of appeals"). On August 1, 2007, the United States Court of Appeals for the Eleventh Circuit denied a timely-filed motion seeking reconsideration of its decision of May 30, 2007, in which it denied petitioner's motion to expand her certificate of appealability.

RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS

The Sixth Amendment of the United States Constitution provides, in pertinent part:

> In all criminal prosecutions, the accused shall . . . have the Assistance of Counsel for his defence.

Title 28 U.S.C. §2253(c)

§2253. Appeal.

* * *

(c)(1) Unless a circuit justice or judge issues a certificate of appealability, an appeal may not be taken to the court of appeals from –

* * *

(B) the final order in a proceeding under section 2255.

(2) A certificate of appealability may issue under paragraph (1) only if the applicant has made a substantial showing of the denial of a constitutional right.

(3) The certificate of appealability under paragraph (1) shall indicate which specific issue or issues satisfy the showing required by paragraph (2).

Federal Rule of Appellate Procedure 22(b).

Rule 22. Habeas Corpus and Section 2255 proceedings.

* * *

(b) Certificate of Appealability.

(1) In a habeas corpus proceeding in which the detention complained of arises from process issued by a state court, or in a 28 U.S.C. §2255 proceeding, the applicant cannot take an appeal unless a circuit justice or a circuit or district judge issues a certificate of appealability under 28 U.S.C. §2253(c). If an applicant files a notice of appeal, the district judge who rendered the judgment must either issue a certificate of appealability or state why a certificate should not issue. The district clerk must send the certificate or statement to the court of appeals with the notice of appeal and the file of the district-court proceedings. If the district judge has denied the certificate, the applicant may request a circuit judge to issue the certificate.

> **(2)** A request addressed to the court of appeals may be considered by a circuit judge or judges, as the court prescribes. If no express request for a certificate is filed, the notice of appeal constitutes a request addressed to the judges of the court of appeals.
>
> **(3)** A certificate of appealability is not required when a state or its representative or the United States or its representative appeals.

STATEMENT OF THE CASE

This case involves the failure of the Eleventh Circuit Court of Appeals to adhere to the rules laid down by this Court as to what a court of appeals should – and should not – do when presented with an application for a certificate of appealability ("COA") pursuant to 28 U.S.C. §2253(c). More specifically, it involves the Eleventh Circuit's refusal to grant a COA to petitioner on her claim of ineffective assistance of counsel despite a split in the circuits on how to resolve the issue of whether petitioner was prejudiced by her trial counsel's failure to properly advise her with respect to a pre-trial plea offer – the very issue upon which the Eleventh Circuit relied in denying petitioner's request for a COA. It also involves the Eleventh Circuit's issuance of a decision on the merits of petitioner's ineffective assistance claim even though the standard for issuing a COA precludes

such a decision, and even though the court had no jurisdiction to do so.

Petitioner Blanca Piedad Ortiz was convicted after a jury trial in the United States District Court for the Southern District of Florida in 2001 on one count of conspiracy to launder money in violation of 21 U.S.C. §1956(h). The essence of the charge was that in her capacity as a bank employee, Ortiz conspired with several customers to launder proceeds of "some form of unlawful activity" through their bank accounts. Prior to trial, the government offered Ortiz the opportunity to plead guilty to one count of conspiracy in violation of 18 U.S.C. §371, which carried a five-year maximum sentence, instead of standing trial on the §1956(h) charge, which – unbeknownst to Ortiz – carried a statutory maximum of 20 years. Relying on information and advice imparted to her by her trial counsel, Ortiz declined the plea offer.

While Ortiz had maintained her innocence before and during trial, at sentencing she acknowledged that the admissions she made in her trial testimony formed the basis for her conviction.[1] Applying the then-mandatory Federal Sentencing Guidelines, the district court determined Ortiz' guideline sentence range to be 324-405 months. As even the low-end of that range was higher than the 20-year statutory maximum, the district court sentenced Ortiz to a

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[1] *See* Motion to Vacate Judgment, filed 08/05/04, Ex.14 (Objections to PSI) at 4, 19-20.

mandatory guideline sentence of 240 months (or 20 years). On appeal, the Eleventh Court, noting the "substantial evidence of a conspiracy involving Ortiz . . . ," upheld Ortiz's conviction but reduced her mandatory sentencing guideline range to 210-262 months.[2] On remand, the district court sentenced Ortiz to the low-end of the reduced mandatory guideline range, imposing a term of 210 months (or 17 ½ years).

Ortiz then filed a motion to vacate judgment under 28 U.S.C. §2255 on the grounds, *inter alia*,[3] that her decision to reject the plea bargain offered her by the government pre-trial met the two-pronged test for ineffective assistance of counsel under *Strickland v. Washington,* 466 U.S. 668 (1984). With respect to the first prong – deficient performance – Ortiz contended that her trial counsel's performance "fell below an objective standard of reasonableness," *see id.* at 688, because he failed to: (1) inform her of her sentencing exposure under the then-mandatory Federal Sentencing Guidelines, or of the statutory maximum she faced if convicted; (2) provide her with an informed, reasonable assessment of the strength of the government's case against her; or (3) advise her as to the desirability of accepting – or even considering –

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[2] *United States v. Ortiz,* No. 02-13012 (11th Cir., April 14, 2003), Slip Op. at 6, 11.

[3] Ortiz raised a second, separate ground for relief under this Court's decision in *United States v. Booker*, 543 U.S. 220 (2005), which has no bearing on this petition.

the plea offer. With respect to the second prong – prejudice – Ortiz contended that there was a "reasonable probability," *see id.* at 694, that, but for her trial counsel's misinformation and misadvice, she would have pled guilty and accepted the offer of a five-year cap on her sentence.

At the hearing on her motion, in addition to presenting her own testimony explaining, *inter alia,* that she would have accepted the plea if properly advised,[4] Ortiz called five witnesses to corroborate various aspects of her claims,[5] including her trial counsel who, as will be discussed further below, confirmed from the witness stand that he had repeatedly advised Ortiz that she was innocent and would be acquitted at trial.[6] Ortiz argued that this corroborative testimony, as well as the disparity between the

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[4] *See* Transcript of hearing ("H.Tr.") 01/05/05 at 11-12, 48-49.

[5] These witnesses – Ortiz' trial counsel, co-defendant's trial counsel, husband, daughter and son-in-law – all testified on the first day of a two-day evidentiary hearing. H.Tr. 12/10/04 at 5-162. Ortiz' trial counsel corroborated virtually all of Ortiz's testimony regarding what he told her – and did not tell her – about her sentencing exposure, the merits of the case, and the plea offer. *Id.* at 5-88. Ortiz' co-defendant's counsel, along with Ortiz's husband, daughter and son-in-law, corroborated the unreasonableness of her trial counsel's assessment of the merits, *id.* at 90-116, 120-124, 144-146, 155-156; and Ortiz's family members additionally corroborated Ortiz's *understanding* of the sentencing prediction communicated to her by her trial counsel, as well as her "shock" when she learned, after trial, of the actual sentence she was facing, *id.* at 117-119, 125-135, 137-143, 151-155, 159-160.

[6] H.Tr.12/10/04 at 9, 22, *see* also *id.* at 13, 21, 75, 85.

5-year cap offered under the proposed plea and the 20-year maximum to which she was exposed after conviction – a disparity of *15 years* – provided "objective evidence" sufficient to meet the *Strickland* test for prejudice.[7]

All of Ortiz' contentions and arguments were rejected by the magistrate judge who issued a Report and Recommendation ("R&R"), concluding that Ortiz had failed to meet either the deficiency or the prejudice prong of *Strickland's* test. App. 9-29, 38. On the issue of prejudice, the magistrate found:

> . . . that Ortiz has *failed to offer any objective evidence* in support of her claim that she would have accepted the plea offer if [her trial counsel] had more thoroughly explained Ortiz' sentencing exposure under the Sentencing Guidelines upon conviction, or if [he] had advised Ortiz to accept the plea offer.

App. 28 (emphasis added). Ortiz filed extensive legal and factual objections to the R&R,[8] to no avail. The

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[7] These arguments were presented in writing in advance of the hearing in Ortiz' Memorandum of Law in Support of Motion to Vacate Judgment, filed 08/05/04, at 18-22, and orally at the hearing's conclusion, H.Tr.01/05/05 at 116-136.

[8] Objections to Magistrate's R&R, filed 05/31/05 in district court. In these Objections, Ortiz pointed out that a particularly troubling aspect of the magistrate's report was that it makes no reference to and *completely fails to take into account* the in-court testimony of the five witnesses who testified on the first day of the hearing – including Ortiz' trial counsel who, in his live

(Continued on following page)

district court adopted the magistrate judge's recommendation to deny Ortiz' §2255 motion, summarily agreeing with the magistrate's conclusions as to Ortiz' ineffective assistance claim, without any discussion of their content. App. 5-6. Subsequently, the district court denied Ortiz' request for a COA on this claim, again without any discussion of the content of the magistrate's conclusions. App. 39-42.[9]

Ortiz then requested a COA from the Eleventh Circuit on her ineffective assistance claim, arguing in detail why "reasonable jurists could debate" each of the magistrate's conclusions, and citing case law from other circuits that directly contradicted those conclusions.[10] Issuing a three and a half page Order, the Eleventh Circuit ratified the district court's denial of the request. App. 1-4. In so doing, the Eleventh Circuit made no comment whatsoever on any aspect of Ortiz' showing on the issue of deficiency. Instead, it focused exclusively on one fact the court viewed as bearing on the issue of prejudice – the fact that Ortiz had maintained her innocence and not "expressed a desire to plead guilty at any time during the trial. . . ," concluding that "[i]n light of [Ortiz'] insistence throughout the [trial] proceedings that she

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testimony, corroborated and amplified virtually all of Ortiz' factual assertions.

[9] The district court did, however, grant Ortiz' request for a COA on her *Booker* claim.

[10] Motion to Expand COA, filed 03/06/06 in the Eleventh Circuit.

was innocent, she has not shown that reasonable jurists would find debatable the district court's finding that she did not demonstrate prejudice." App. 4.

While at first blush this conclusion pays lip service to the proposition that, in considering a request for a COA, "the appellate court should ' . . . ask whether [the district court's] resolution was debatable among jurists of reason,'" App. 2, *quoting Miller-El v. Cockrell*, 537 U.S. 322, 336 (2003), as will be demonstrated below, the Eleventh Circuit did not make that inquiry; instead, it completely ignored the facts and the law presented by Ortiz which directly *demonstrate the debatability* of the district court's no-prejudice conclusion.[11] Moreover, as will also be discussed below, the Eleventh Circuit's denial of the requested COA, notwithstanding competing lines of authority, was in effect a decision that Ortiz' "insistence throughout the [trial] proceedings that she was innocent" foreclosed a demonstration of prejudice – a decision that rejected Ortiz' ineffective assistance claim *on the merits*.

Ortiz moved for reconsideration of the Eleventh Circuit's denial of her request for a COA on the ground that its conclusion – that Ortiz "has not shown that reasonable jurists would find debatable the district court's finding that she did not demonstrate prejudice"

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[11] *See* Motion to Expand COA, *supra*, at 34-40.

– was factually and legally erroneous.[12] But the Eleventh Circuit summarily denied this motion. App. 43.

REASONS FOR GRANTING THE WRIT

A GVR ORDER SHOULD ISSUE TO CORRECT THE ERRORS OF THE COURT BELOW IN DENYING ORTIZ'S REQUEST FOR A CERTIFICATE OF APPEALABILITY AND IN RULING ON THE MERITS OF HER INEFFECTIVE ASSISTANCE CLAIM.

This Court should issue a GVR order granting this petition, vacating the COA denial and remanding the matter in order to correct two overarching errors committed by the Eleventh Circuit Court of Appeals – (a) its refusal to grant Ortiz a COA on her claim of prejudice from the deficient performance of her trial counsel because she insisted on her innocence at trial, despite competing authority in other circuits; and (b) its issuance of a decision that was in effect a determination of *the merits* of petitioner's ineffective assistance claim, contrary to the standard for issuing a COA and despite lack of jurisdiction to do so.

[12] Motion to Reconsider, filed 06/18/07 in the Eleventh Circuit.

A. The Court Below Flouted Clear Supreme Court Authority by Denying a COA Despite a Split in the Circuits on the Very Issue Which It Relied Upon to Justify its Denial.

In *Barefoot v. Estelle*, 463 U.S. 880, 893 (1983), this Court announced the standard for a state habeas petitioner to obtain a "certificate of probable cause" ("CPC") which, at that time, was the statutory prerequisite for such a petitioner to pursue an appeal. To obtain a CPC, *Barefoot* held, a habeas petitioner was required to make a "substantial showing of the denial of a federal right." *Id.*, 463 U.S. at 893. *Barefoot* summed up this standard as follows:

> In requiring a . . . "substantial showing of the denial of [a] federal right," obviously the petitioner need not show that he should prevail on the merits. He has already failed in that endeavor. Rather, he must demonstrate that the issues are *debatable among jurists of reason*; that a court *could* resolve the issues [in a different manner]; or that the questions are "adequate to deserve encouragement to proceed further."

Id., 463 U.S. at 893 n.4 (emphasis added) [citations omitted].

Applying the *Barefoot* standard in *Lozada v. Deeds*, 498 U.S. 430 (1991) (*per curiam*), the Court held that, even though an issue may be well-settled in a particular circuit, a petitioner would meet the standard for issuance of a CPC if other circuits had reached a conflicting conclusion. In *Lozada*, a case

arising within the Ninth Circuit, the habeas petitioner had contended that his counsel's failure to inform him of his right to appeal constituted ineffective assistance, but he had failed to specify any prejudice from this deficiency. *Id.*, at 430-31. Because the failure to so specify was fatal to an ineffective assistance claim under Ninth Circuit precedent, both the district and appellate courts denied a CPC. *Id.* This Court, however, reversed, holding this denial was error because even though the Ninth Circuit required a showing of prejudice, other circuits did not. *Id.* at 432. Pointing out that "the issue of prejudice caused by the alleged denial of the right to appeal *could be resolved in a different manner* from the one followed by the District Court. . . . [as] at least two Courts of Appeals have presumed prejudice in this situation," *id.* (emphasis added), this Court held that "under the standard[] set forth in *Barefoot*, Lozada made a substantial showing that he was denied the right to effective assistance of counsel," *id.* The fact that two other circuits had decided the issue in a different manner, in other words, rendered a conclusion that was well-established in the Ninth Circuit *debatable* for purposes of the *Barefoot* standard.

With the enactment of the Antiterrorism and Effective Death Penalty Act, Pub. L. 104-132, 110 Stat. 1214 in 1996, federal as well as state prisoners seeking to appeal the denial of post-conviction relief must now obtain a "certificate of appealability" ("COA"), either from the district court or from the

court of appeals, as to each issue on which an appeal is sought. 28 U.S.C. §2253(c); Fed. R. App. P. 22(b)(1). The statutory prerequisite to obtaining a COA is that "the applicant has made a substantial showing of the denial of a constitutional right." §2253(c)(2). In *Slack v. McDaniel*, 529 U.S. 473, 483 (2000), the Court recognized that "[e]xcept for substituting the word 'constitutional' for the word 'federal,'" §2253 codified the CPC standard that was earlier "announced in *Barefoot*." Accordingly, "with due note for the substitution of the word 'constitutional,'" the Court gave the language in §2253 "the meaning ascribed it in *Barefoot*." *Id.*, 529 U.S. at 483.

Thus, at least since *Slack* the rule has been clear: – to obtain a COA under §2253(c), a petitioner in a §2255 proceeding must meet the *Barefoot* standard, which "includes showing that *reasonable jurists could debate* whether (or, for that matter, agree that) the petition should have been resolved in a different manner or that the issues presented were 'adequate to deserve encouragement to proceed further.'" *Id.*, 529 U.S. at 484, *quoting Barefoot*, 463 U.S. at 893 & n.4 (emphasis added). "The question is the *debatability* of the underlying constitutional claim, not the resolution of that debate." *Miller-El v. Cockrell*, 537 U.S. 322, 342 (2003) (emphasis added).

Moreover, as the decisions in both *Slack v. Daniel* and *Miller-El v. Cockrell* make clear, when an applicant for a COA has met the *Barefoot* standard by demonstrating that "reasonable jurists *could debate* whether (or, for that matter, agree that) the petition

should have been resolved in a different manner," a COA *should be granted. See Slack v. Daniel,* 529 U.S. at 484 (" . . . a COA *should issue* when the prisoner shows, at least, that jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right . . . " (emphasis added)); *Miller-El*, 537 U.S. at 327 ("Applying these principles to petitioner's application, we conclude a COA *should have issued*" (emphasis added)); *id.*, 537 U.S. at 341 (same).[13]

Here, in denying petitioner a COA on her ineffective assistance claim, the Eleventh Circuit flouted these rules. To be sure, the Eleventh Circuit paid lip service to the requirement that it ' . . . ask whether [the district court's] resolution was debatable among jurists of reason,'" App. 2, *quoting Miller-El v. Cockrell*, 537 U.S. at 336. But despite its reference to the need to do so, the Eleventh Circuit did *not* conduct such an inquiry. Had it done so, it would have discovered at least the following factors that *demonstrate the debatablity* of its conclusion, at App. 4, that

[13] Any doubt that an applicant who meets the *Barefoot* standard is *entitled* to obtain a COA is put to rest by the clarification in *Miller-El v. Dretke*, 545 U.S. 231, 237 (2005), that the Court granted certiorari in *Miller-El v. Cockrell* "to consider whether Miller-El was *entitled* to review on [his constitutional] claim" (emphasis added) – a question to which the Court answered "yes." While, in his concurring opinion in *Miller-El v. Cockrell,* Justice Scalia expressed the view that meeting the *Barefoot* standard "*does not entitle* an applicant to a COA," *id.*, 537 U.S. at 349 (*italics* in original), that view was clearly not adopted by a majority of the Court.

"[i]n light of [Ortiz'] insistence throughout the [trial] proceedings that she was innocent . . . she did not demonstrate prejudice" under *Strickland*.

First, on the record of the hearing, it is clear that the *reason* Ortiz' insisted on her innocence at trial and never "expressed a desire to plead guilty," *see* App. 4, was that her trial counsel *advised* her that this was the "correct" path to follow. Indeed, despite his awareness of the government's evidence,[14] Ortiz' trial counsel admitted on the witness stand that he told her "[a]bsolutely" that "she was correct" to maintain her innocence, that she was "going to win" at trial, and that he was, in fact, "100% convinced that this case was going to be acquitted by the jury."[15] Furthermore, trial counsel admitted that he "never thought about" or discussed with Ortiz the possibility that the jury might not believe her testimony or that she could be convicted; and he never "went into any real . . . discussion as to whether she should or should not accept the offer," nor advised her "to give serious consideration to the plea offer."[16] Ortiz testified to the same effect.[17]

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[14] *See* H.Tr.12/10/04 at 23, 65-70, 72.

[15] H.Tr.12/10/04 at 13, 22; *see id.* at 9, 21.

[16] H.Tr.12/10/04 at 8, 13, 75, 85.

[17] Ortiz explained that the reason she persisted in maintaining her innocence was that her trial counsel told her that "he agreed . . . [she] was innocent according to the evidence . . . he had reviewed," that he "couldn't find anything that would incriminate [her, or] see anything legally [proving] that . . . [she

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At least three other circuits view such conduct by an attorney as deficient performance.[18] These precedents were cited in Ortiz' Motion to Expand COA, *supra,* at 13. That in itself is sufficient to find that reasonable jurists could resolve the issue of prejudice in this case differently. For if a defendant's insistence upon innocence is a *result* of her attorney's deficiency – as the record demonstrated occurred here – then that insistence cannot logically be used to *preclude* finding *Strickland* prejudice from that very deficiency.

Second, decisions from at least two other circuits have concluded that the test for prejudice under

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had] done something wrong," and that "[her] explanations would be accepted by the jury." H.Tr.01/05/05 at 12, 36-37, 51-52. She further testified that her trial counsel "never advised . . . or told [her] to consider [the plea offer] and neither did [she] do [so]." *Id.* at 49.

[18] *Second Circuit*: *Cullen v. United States*, 194 F.3d 401, 404 (2d Cir. 1999) (despite fact that defendant "had adamantly professed his innocence and . . . never indicated any willingness to plead guilty," counsel's failure to give any "advice as to whether . . . plea bargain should be accepted" was deficient); *Sixth Circuit*: *Smith v. United States*, 348 F.3d 545, 551, 553 (6th Cir. 2003) (defendant's "maint[enance of] . . innocence throughout . . . proceedings, including. . . . testifying . . . at trial that he did not engage in . . . [charged] conduct," does not preclude finding deficiency from counsel's failure to properly advise as to whether or not to accept plea); *Seventh Circuit*: *Toro v. Fairman*, 940 F.2d 1065, 1067-1068 (7th Cir. 1991) (although defendant "thought [what] he was doing" was not criminal, counsel's advice to proceed to trial instead of accepting plea was deficient).

Strickland may be met under exactly the same circumstances that obtained here. Thus, the Second Circuit in *Cullen v. United States*, 194 F.3d at 407, held that "[t]hough [defendant's] insistence on his innocence is a factor relevant to any conclusion as to whether he has shown a reasonable probability that he would have pled guilty, it is *not dispositive*[;] . . . . if he had been properly informed . . . [defendant] might well have abandoned his claim of innocence" (emphasis added). Similarly, the Sixth Circuit in *Griffin v. United States,* 330 F.3d 733, 738 (6th Cir. 2003), held that "repeated declarations of innocence do not prove . . . that [defendant] would *not* have accepted a guilty plea" (emphasis added). *See also Smith v. United States*, 348 F.3d at 552 (6th Cir. 2003) (recognizing that since defendant "may enter . . . guilty plea while maintaining innocence," it "does not make sense to say that . . . defendant's protestations of innocence belie . . . later claim . . . he would have accepted . . . guilty plea"). Under these precedents,[19] where courts have *actually concluded* – exactly contrary to the Eleventh Circuit's conclusion here – that, notwithstanding a defendant's "sustained proclamations of innocence, before and during . . . trial," *see Cullen*, 194 F.3d at 405, there is "a reasonable probability that [defendant] would have accepted the offer had it been properly presented by . . . counsel," *id.* at 407 – it cannot reasonably be said that

[19] These precedents were cited in Ortiz' Motion to Expand COA, *supra*, at 36-37.

reasonable jurists would *not* find this proposition at the very least *debatable*.

Third, in reaching its conclusion that Ortiz did not show "debatability" on the issue of prejudice, the Eleventh Circuit failed to consider a key factor which courts in at least three other circuits have identified as an "objective" and/or sufficient basis to find a reasonable probability that a defendant would have accepted a plea offer if properly advised[20] – namely, a significant *disparity* between the sentence offered under the proposed plea and the sentence which could have been or was imposed after conviction. *See, e.g., Second Circuit*: *Cullen*, 194 F.3d at 407 ("if [defendant] had been properly informed of . . . significant difference between . . . likely sentencing range after trial and under . . . offered plea bargain" – 121-151 months after trial compared to 78-97 months under plea (*id.* at 404) – "[defendant] might well have abandoned . . . claim of innocence" and pled guilty); *United States v. Gordon*, 156 F.3d 376, 380-81 (2d Cir. 1998) ("great disparity between . . . actual maximum sentencing exposure under . . . Sentencing Guidelines and . . . sentence exposure represented by defendant's

[20] This Court has imposed no requirement that "objective evidence" must be tendered to satisfy *Strickland's* prejudice test; but, as noted in *Tse v. United States*, 290 F.3d 462, 464 (1st Cir. 2002), "[t]here is a split among the courts of appeals as to whether a defendant's post-conviction testimony that he would have accepted a plea offer is sufficient to show prejudice, or, conversely, whether the defendant must adduce objective evidence to that effect."

attorney" – 262-327 months exposure compared to 120 months estimated (and 84 months offered under plea) – "provides sufficient objective evidence[,] when combined with . . . [defendant's] statement concerning his intentions[,] to support . . . finding . . . prejudice under *Strickland*"); *Third Circuit*: *United States v. Day*, 969 F.2d 39, 40, 45 (3d Cir. 1992) (in assessing prejudice, court did "not find it at all implausible" that although defendant rejected five-year plea "when he believed . . . his sentence exposure was eleven years, he would have pleaded guilty had he known . . . he would receive . . . sentence of almost twenty-two years"); and *Sixth Circuit*: *Griffin*, 330 F.3d at 739 (court "cannot say, given [*inter alia*] the disparity in sentences" – 156 months after trial compared to five years under plea (*id.* at 735) – "that [defendant] would not have changed his mind and accepted . . . plea"); *Magana v. Hofbauer*, 263 F.3d 542, 550 (6th Cir. 2001) (due, *inter alia*, to "large disparity" between sentence imposed after trial and sentence offered under plea – two consecutive 10-20 year sentences imposed compared to straight 10 years offered – court was "convince[d] . . . there was at least . . . *reasonable probability* that [defendant] would have accepted . . . plea offer had he known his true sentencing exposure" (*italics* in original)).[21]

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[21] *Cf. United States v. Ridgeway*, 321 F.3d 512, 514 (5th Cir. 2003) (court found *no* prejudice under *Strickland* where "even if he pled guilty, [defendant] would have faced at least 120 months in prison[,] . . . . [which] is not 'significantly less harsh' than the 121-month sentence that [defendant] actually received").

Significantly, in at least two of these decisions – the Second Circuit's *Cullen* and the Sixth Circuit's *Griffin* – the courts expressly recognized and *were not deterred by* the fact that the defendants had insisted on their innocence at trial.

The Eleventh Circuit also failed to consider the decision in *Glover v. United States*, 531 U.S. 198 (2001), where, in a case involving an erroneous guidelines' calculation, this Court reversed a lower court holding that an increase of "anywhere between 6 and 21 months" was not a sufficiently "significant increase in a term of imprisonment" to constitute prejudice under *Strickland*, stating:

> Authority does not suggest that a minimal amount of additional time in prison cannot constitute prejudice. Quite to the contrary, our jurisprudence suggests that any amount of actual jail time has Sixth Amendment significance.

Id. at 202-203 (emphasis added) [citations omitted].

Given that the "disparity" here – between the plea offer of five years compared to the sentence of 20 years imposed after trial, or even 17½ years as reduced after appeal – far exceeds the increase in *Glover* and fits squarely under the precedents in

other circuits,[22] there can be no doubt that reasonable jurists, at the very least, "could debate whether (or, for that matter, agree that)," *see Slack,* 529 U.S. at 484, Ortiz has met the *Strickland* test for prejudice.

* * *

Accordingly, given the facts of this case and the law in other circuits, the Eleventh Circuit's conclusion that "[no] reasonable jurists would find debatable the district court's finding that [Ortiz] did not demonstrate prejudice" is simply insupportable. Under the *Barefoot* standard for the issuance of a COA, the Eleventh Circuit plainly erred in denying Ortiz' request for a COA on her ineffective assistance claim, and its decision denying the COA should not be permitted to stand.

B. The Court Below Flouted Clear Supreme Court Authority by Issuing a Decision that Was in Effect a Determination on the Merits of Ortiz' Ineffective Assistance Claim.

The Eleventh Circuit's decision denying Ortiz' request for a COA is cloaked in the language of non-debatablity. Recounting that Ortiz maintained her innocence and did not "express[] a desire to plead guilty at any time during the trial proceedings," the Eleventh Circuit intones the mantra that Ortiz "has not shown that reasonable jurists would find

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[22] These precedents were all cited in Ortiz' Motion to Expand COA, *supra,* at 24, 39.

debatable" her claim of prejudice. *See* App. 4. However, the Eleventh Circuit must be deemed *to know* that other circuit courts of appeal have enunciated principles under which reasonable jurists not only *could* debate whether Ortiz' claim of prejudice despite her insistence on her innocence at trial "should have been resolved in a different manner," *see Slack*, 529 U.S. at 484 (emphasis added), but, indeed, have actually *decided* similar cases "in a different manner," *see id.* – in a manner in which insistence upon innocence did *not* foreclose a demonstration of prejudice.[23]

For that reason, the Eleventh Circuit's assertion that Ortiz' claim of prejudice is non-debatable is disingenuous at best. In reality, the Eleventh Circuit's decision is a determination that Ortiz *would not prevail* in the Eleventh Circuit on her claim of prejudice. But such a determination – a determination that no matter what other courts of appeals have held, Ortiz would not prevail in the Eleventh Circuit – is tantamount to a decision that rejects Ortiz' claim *on the merits*. This was error for two reasons.

First, the *Barefoot* standard specifically directs that, in applying for a COA, "the petitioner *need not show* that [s]he should prevail on the merits[;] [she] has already failed in that endeavor." *Barefoot*, 463 U.S. at 893 n.4 (emphasis added). That means that a

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[23] As noted above, the precedents reflecting this debate and different resolution were specifically *cited* by Ortiz in her Motion to Expand the COA.

§2255 petitioner's entitlement to pursue an appeal is *not* conditioned on persuading the lower court, in advance, that the appeal must ultimately prevail, but, rather, only that reasonable jurists *could debate* the issue: "[t]he question is the debatability of the underlying constitutional claim, not the resolution of that debate," *Miller-El v. Cockrell*, 537 U.S. at 342. The task of the lower court in considering a request for a COA, therefore, is only to conduct a "threshold inquiry," *Slack*, 529 U.S. at 482, *not* to conduct a full review of the merits. Indeed, "[d]eciding the substance of an appeal in what should only be a threshold inquiry undermines the concept of a COA." *Miller-El v. Cockrell*, 537 U.S. at 342. If the lower court were allowed to decide the merits of claims upon a request for a COA, then only those §2255 petitioners who will ultimately prevail on appeal would be allowed to pursue an appeal in the first place, and the COA process would be converted into the appeal itself. That is precisely the erroneous effect of the Eleventh Circuit's decision here.

Second, under the specific dictate of this Court's decision in *Miller-El v. Cockrell*, 537 U.S. at 342, the Eleventh Circuit's rejection of Ortiz' claim on the merits "was incorrect for an even more fundamental reason[:] [b]efore the issuance of a COA, the Court of Appeals had *no jurisdiction* to resolve the merits of petitioner's constitutional claims." (Emphasis added). "[A] COA determination is a separate proceeding, one distinct from the underlying merits," *id.*, and a court

of appeals may not conduct a merits consideration prior to a favorable outcome in a COA proceeding.

That this is so is clear from the relevant statutory language. Title 28 §2253(c)(1)(B) thus states in pertinent part:

> *Unless a circuit justice or judge issues a certificate of appealability, an appeal may not be taken* to the court of appeals from. . . . the final order in a proceeding under section 2255. [Emphasis added].

Similarly, Fed. R. App. P. 22(b)(1) states in pertinent part:

> In . . . a 28 U.S.C. §2255 proceeding, *the applicant cannot take an appeal unless a circuit justice or a circuit or district judge issues a certificate of appealability* under 28 U.S.C. §2253(c). [Emphasis added.].

Under the plain meaning of this language, "an appeal" may *not* proceed on the merits "unless" and until a COA has been issued. Yet, here, the Eleventh Circuit proceeded to resolve the issue of Ortiz' claim of prejudice on the merits *without a COA having been issued*. Jurisdictionally, it had no authority to do so.

* * *

Accordingly, in determining that Ortiz could never prevail in the Eleventh Circuit on the issue of prejudice, the Eleventh Circuit erred both in applying an erroneous standard for issuance of a COA and in acting beyond the jurisdiction conferred upon it by 28

U.S.C. §2253(c). In order to correct these flagrant errors and ensure adherence to its rules regarding the issuance of a COA – and, indeed, to permit Ortiz to pursue her substantial constitutional claim of ineffective assistance of counsel – this Court should reverse the decision of the Eleventh Circuit denying Ortiz a COA.

CONCLUSION

For the foregoing reasons, petitioner Blanca Piedad Ortiz requests that this Court issue a GVR order granting this petition, vacating the COA denial and remanding this matter to the United States Court of Appeals for the Eleventh Circuit for the issuance of the requested COA on Ortiz' ineffective assistance claim, and, thereafter, to conduct a full examination of the merits of that constitutional claim.

Respectfully submitted,

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October 25, 2007

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 05-15798-A

BLANCA PIEDAD ORTIZ,

Petitioner-Appellant,

versus

UNITED STATES OF AMERICA,

Respondent-Appellee.

Appeal from the United States District Court
for the Southern District of Florida

(Filed May 30, 2007)

ORDER:

In her § 2255 motion, the appellant claimed: (1) her trial counsel was ineffective in advising her regarding the government's plea offer by failing (a) to inform her correctly of her sentencing exposure under the alternative options of pleading guilty or standing trial, (b) to provide her with a reasonable assessment of the merits of the government's case, and (c) to advise her of the need to consider the plea offer; and (2) the trial court imposed a sentence based on judicial fact finding that was greater than the maximum

sentence charged in the indictment and authorized by the jury's verdict in violation of her Fifth and Sixth Amendment rights under *United States v. Booker*, 543 U.S. 220, 125 S.Ct. 738, 160 L.Ed.2d 621 (2005). The district court granted her motion for a certificate of appealability ("COA") to appeal the denial of her 28 U.S.C. § 2255 motion as to claim 2. The appellant now has moved to expand the COA to include claims 1 (a) through (c).

In order to obtain a COA, a petitioner must make "a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). In determining whether to grant a COA, the appellate court should "look to the District Court's application of the AEDPA to the petitioner's constitutional claims and ask whether that resolution was debatable among jurists of reason. This threshold inquiry does not require full consideration of the factual or legal basis adduced in support of the claims. In fact, the statute forbids it." *Miller-El v. Cockrell*, 537 U.S. 322, 336, 123 S.Ct. 1029, 1039, 154 L.Ed.2d 931 (2003).

To make a successful claim of ineffective assistance of counsel, a defendant must show that: (1) her counsel's performance was deficient, and (2) that the deficient performance prejudiced his defense. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052, 2064, 80 L.Ed.2d 674 (1984). In determining whether counsel gave adequate assistance, "counsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment." *Id.* at 690,

104 S.Ct. at 2066. Counsel's performance is deficient only if it falls below the wide range of competence demanded of attorneys in criminal cases. *Id.* at 688, 104 S.Ct. at 2065. To make such a showing, a defendant must demonstrate that "no competent counsel would have taken the action that his counsel did take." *United States v. Freixas*, 332 F.3d 1314, 1319-20 (11th Cir. 2003) (quotation omitted). Prejudice is a "reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland*, 466 U.S. at 694, 104 S.Ct. at 2068. Where a defendant challenges a not-guilty plea based on ineffective assistance of counsel, she must show that there is a reasonable probability that, but for counsel's errors, she would have pled guilty and would not have insisted on going to trial. *Coulter v. Herring*, 60 F.3d 1499, 1504 (11th Cir. 1995); *Diaz v. United States*, 930 F.2d 832, 835 (11th Cir. 1991). In light of the general principles and presumptions applicable to a claim of ineffective assistance of counsel, the cases in which a habeas petitioner can prevail are few and far between. *Chandler v. United States*, 218 F.3d 1305, 1313-14 (11th Cir. 2000) (*en banc*).

Appellant has now [sic] shown here that reasonable jurists would find debatable the district court's finding that she could not demonstrate prejudice from counsel's allegedly deficient representation. It is undisputed that counsel informed appellant of the plea offer from the government to accept a plea to a lesser conspiracy charge with a five-year statutory

maximum sentence. When asked at the evidentiary hearing about her response when counsel informed her of the plea offer, appellant testified that she told counsel that she felt she was innocent and did not know what charge to which she could plead guilty. Appellant stated that she was insistent about her feeling that she was innocent at the time and persisted in her belief that she was innocent throughout the trial. In fact, appellant testified that she still believed she had done nothing wrong until her present habeas counsel met with her. Appellant knew that the government had offered her a plea deal with a statutory maximum sentence and that, if she went to trial and was found guilty, she faced a sentence of at least twice as long based on counsel's representations. Yet, there is no indication in the record that the appellant expressed a desire to plead guilty at any time during the trial proceedings.

In light of appellant's insistence throughout the proceedings that she was innocent, she has not shown that reasonable jurists would find debatable the district court's finding that she did not demonstrate prejudice. Therefore, appellant's motion to expand the COA is DENIED.

/s/ Franum Hull
UNITED STATES
CIRCUIT JUDGE

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO.
04-21990-CIV-MIDDLEBROOKS/JOHNSON

BLANCA PIEDAD ORTIZ

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent. /

ORDER ADOPTING REPORT & RECOMMENDATION

(Filed Aug. 12, 2005)

THIS CAUSE comes before the Court upon the Petitioner's Motion for Writ of Habeas Corpus pursuant to 28 USC § 2255. This matter was referred to the Honorable Linnea R. Johnson for the issuance of a Report & Recommendation ("R&R"). The petition seeks, among other things,[1] to have this Court find

[1] The Petition also seeks to have various sentencing enhancements stricken pursuant to recent Supreme Court decisions relating to the Sentencing Guidelines and/or issues which must be presented to a jury. *See Blakely v. Washington*, 124 S.Ct. 2531 (2004); *United States v. Booker* and *United States v. Fanfan*, 125 S. Ct. 738 (2005); *Apprendi v. New Jersey*, 530 U.S. 466, 490 (2000). These claims are not relevant to the resolution of Petitioner's claim of ineffective assistance of counsel. The resolution of these requests is purely a question of law which do

(Continued on following page)

that Petitioner's counsel was ineffective in his representation of Petitioner because: he never advised her that she should consider a plea agreement offered by the government which would have capped her jail time to five years; he consistently misrepresented the maximum sentence that she would receive as ten to twelve years, but more likely around five; and he negligently failed to recognize the strength of the government's case against her, and accordingly failed to encourage her to take the offered plea..

The Magistrate Judge held an evidentiary hearing on December 10, 2004 and issued her R&R which recommended that the Petitioner's Motion be denied on February 28, 2005 (DE 35). The Petitioner filed her Objections to the R&R on June 1, 2005.[2] The Court has reviewed the magistrates report, the Petitioner's Objections thereto, and has conducted a *de novo* review of the entire record of the instant case as well as the criminal matter underlying the instant case. The Court finds that the comprehensive R&R correctly addressed all but one of the issues presented within the Petitioner's Motion. That issue was the portion addresses whether or not Petitioner, regarding her *Booker/Blakely* claim is able to satisfy the requirement of "actual prejudice" sufficient to overcome the procedural default, stated that Petitioner's

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not require the Court's assessment of factual issues such as those raised in the ineffective assistance of counsel claims.

[2] The Objections were timely as the Court granted Petitioner's Motions for Extension of Time.

argument was "nothing but speculation." Had the Sentencing Guideline been advisory, I likely would have imposed a lesser sentence.[3] Such fact, however, at this time, under the law as it presently exists, does not affect the outcome of the Petitioner's Motion.

Accordingly, for the reasons set forth in the R&R, and based upon the Courts personal recollection of the events that transpired during the entire course of the underlying criminal matter, the Court finds that the petition for writ of habeas corpus is due to be denied. Accordingly, it is

ORDERED and ADJUDGED that the Magistrates Report & Recommendation be and is hereby ADOPTED. The Petition for Writ of Habeas Corpus is DENIED. The Clerk of Court shall mark this CASE as CLOSED and DENY any PENDING MOTIONS as MOOT.

DONE and ORDERED in Chambers, at West Palm Beach, Florida this 12 day of August, 2005.

/s/ Donald M. Middlebrooks
DONALD M. MIDDLEBROOKS
UNITED STATES DISTRICT JUDGE

Copies to: Russell R. Killinger, AUSA
Jeanne Baker, Esq.

[3] Accordingly, should the Supreme Court or the Eleventh Circuit deem *Booker/Blakely* to be subject to retroactive application, the Court would find re-sentencing appropriate.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO.
04-21990-CIV-MIDDLEBROOKS/JOHNSON

BLANCA PIEDAD ORTIZ

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.
_____/

REPORT AND RECOMMENDATION

(Filed Feb. 28, 2005)

THIS CAUSE is before the Court on Petitioner, Blanca Piedad Ortiz' ("Ortiz"), Motion to Vacate Judgment Pursuant to 28 U.S.C. §2255 With Request For Evidentiary Hearing (D.E. #1). This matter was referred to the undersigned United States Magistrate Judge by the Honorable Donald M. Middlebrooks, United States District Judge for the Southern District of Florida, and is now ripe for judicial review. That part of the Petition seeking an evidentiary hearing has already been granted and a hearing on this matter took place before the undersigned on December 10, 2004. For the following reasons the undersigned respectfully recommends Petitioner's Motion to Vacate Judgment Under 28 U.S.C. §2255 be denied.

I. BACKGROUND AND FINDINGS OF FACT

Ortiz is presently confined in a Federal Correctional Institution serving a sentence of 210 months imprisonment. On June 1, 2001, Ortiz, together with two co-defendants, Lucia Ramirez ("Ramirez") and Stella Collazos Lozano ("Collazos")[1], was indicted in the Southern District of Florida, for conspiracy to launder money, by (a) conduct[ing] financial transactions" in violation of 18 U.S.C. §1956(A)(1)(B)(1), or (b) "transfer[ing] . . . funds" to or from the United States in violation of 18 U.S.C. § 1956(A)(2)(B)(1) – all in violation of 21 U.S.C. §1956(h). Ortiz, accompanied by her attorney, Julio Ferrer Roo ("Roo"), entered a not guilty plea to the indictment on August 14, 2001.

Ortiz proceeded to trial and on December 19, 2001, the jury returned a verdict of guilty. On May 22, 2002, the District Court entered judgment against Ortiz and sentenced her to 240 months imprisonment, the maximum amount allowable under the statute, followed by two years of supervised release. Ortiz appealed to the Eleventh Circuit alleging numerous Fifth and Sixth Amendment errors. On April 24, 2003, the Eleventh Circuit issued an unpublished opinion affirming Ortiz' conviction, but remanding the case for limited resentencing. On August 4, 2003, pursuant to the Eleventh Circuit Mandate,

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[1] Co-defendant Collazos, a resident of Columbia, was never arrested.

the District Court entered an amended judgment, reducing Ortiz' term of imprisonment to 210 months. Ortiz remains incarcerated at present.

On September 19, 2001, less than two months after she was indicted, Ortiz and Co-defendant Ramirez appeared before the court for a status conference during which the prosecuting attorney advised everyone present that a conviction after a jury trial would result in a prison sentence of at least 14 years, and possibly more. Transcript of September 19, 2001 Status Conference before Judge Middlebrooks, pg. 5, attached as Ex. 8 to Ortiz Appendix (D.E. #3). Both Ortiz and her husband were present at this hearing. At the hearing before the undersigned Ortiz testified that she does not recall having heard the prosecuting attorney's sentence prediction of at least 14 years at the September 19, 2001 status conference. According to Ortiz, she doesn't "understand English 100%" and often didn't understand what was said at hearings until her attorney explained them to her. This Court finds as a matter of fact this statement by Ortiz to be not credible. First, the Record reveals that Ortiz had an interpreter at the September 19, 2001 status conference, belying her claim that she couldn't understand the proceedings. Next, Ortiz is no uneducated, unsophisticated, stay-at-home housewife with little contact with the outside world. She has been in this Country for 35 years, and for at least the last several years has held a powerful position at BankAtlantic as Vice President of International Banking. With this background, Ortiz was certainly well equipped at the

September 19, 2001 hearing to understand and appreciate the ramifications of the simple statement made by the prosecutorial attorney that she was looking at a minimum of 14 years if convicted. This brings the undersigned to the final point, which is that the concept at issue, namely, that if convicted Ortiz was looking at a possible prison sentence of at least 14 years, is not in any way complex or difficult to comprehend without attorney assistance. Anyone with a third grade education would be able to understand and appreciate the significance of the prosecutorial statement: "Now they are looking, under the Guidelines, as I figure, if they go to trial and get convicted, they are looking at probably 14 years in prison at least and possibly more." *Id.*

One month later, on October 18, 2001, Ortiz appeared before Judge Middlebrooks for another status conference. At that time the government attorney announced to the Court a plea offer that was made to Ortiz which would limit Ortiz' maximum exposure to five years in prison. Transcript of October 18, 2001, Status Conference before Judge Middlebrooks, pg. 3, attached as Ex. A to Government Appendix. Ortiz' attorney, Mr. Roo, stated that his client intended to avail herself of her constitutional right to go to trial. *Id.* at pg. 8.

At the hearing before the undersigned Ortiz admitted that she had been informed by her attorney of the five year plea offer just after the October 18, 2001 status conference. According to Ortiz, attorney Roo described the plea offer as a five year cap, and

explained that if she went to trial and was convicted she would probably get five years, but could get up to ten years. Ortiz testified that in considering the plea offer with Roo on the day in question she was adamant about her innocence and in light of such innocence did not know what she could possibly plead guilty to. Ortiz testified that of further significance to her decision not to accept the plea offer was her and her attorney's review of the evidence which they believed was not strong enough to obtain a conviction.

In an affidavit filed by defense counsel, Roo testified that he believes he told Ortiz that she was facing "ten years, possibly 12" and that a note in his file reveals that in an August 15, 2001 telephone call Mr. Killinger, the prosecutor in the underlying case, made reference to a possible guideline sentence of 11-14 years.

At the time of the plea offer Ortiz knew that her subordinate at the bank and Co-defendant, Ramirez, had agreed to the Government plea offer. Ortiz testified that she and her attorney reviewed the evidence and the possible damage Ramirez' testimony might cause and concluded that any testimony she might offer could not implicate her so long as she testified truthfully. Ortiz eventually went to trial on December 6, 2001 and Ramirez testified against her. On December 19, 2001, the jury returned a verdict of guilty. At no time before or during sentencing or on appeal did Ortiz complain or announce surprise a the recommended sentence or of her decision to reject the plea offer and proceed to trial. Indeed, Ortiz prosecuted an

appeal alleging numerous trial and sentencing errors, but significantly did not raise any Fifth or Sixth Amendment claims with respect to sentencing. The instant §2255 motion to vacate, set aside or correct sentence was timely filed by Ortiz on November 5, 2004.

II. LEGAL ANALYSIS

The instant motion filed pursuant to 28 U.S.C. §2255 was filed in this Court on August 5, 2004, and alleges that: (1) Ortiz' Sixth Amendment rights were violated by the ineffective assistance of her trial counsel in misinforming and misadvising her regarding the plea bargain offered by the Government prior to trial; and, (2) Ortiz' Fifth and Sixth Amendment rights were violated by the imposition upon her of a sentence enhanced by factors not charged in the indictment or found by the jury. Each of these charges of error shall be addressed in turn.

A. Ortiz Has Failed To Establish A Claim Of Ineffective Assistance Of Counsel

The law is well established that a defendant has a Sixth Amendment right not just to counsel, but to "reasonably effective assistance" of counsel. *Strickland v. Washington*, 466 U.S. 668, 687-688 (1984). This right to effective assistance of counsel attaches after the initiation of formal charges, and clearly is in play at the plea negotiation stage. *Moran v. Burbine*, 475 U.S. 412, 431 (1986) ("Sixth Amendment right to

counsel . . . attach[es] . . . after the initiation of formal charges"); *Hill v. Lockhart,* 474 U.S. 52, 56 (1985) (quoting *McMann v. Richardson,* 397 U.S. 759, 771 (1970)) ("defendant [who] . . . enters his plea upon the advice of counsel [entitled to] advice . . . 'within the range of competence demanded of attorneys in criminal cases'"). Claims of ineffective assistance of counsel, whether arising in the trial or in the plea process, are determined by utilizing the two-prong analysis first announced in *Strickland,* 466 U.S. at 687-688 (1984). The burden of proof remains on petitioner throughout a habeas corpus proceeding. *Roberts v. Wainwright,* 666 F.2d 517, 519 n. 3 (11th Cir. 1982). Under *Strickland,* in order for a petitioner to establish that his attorney was ineffective, he must show that: (1) his attorney's performance was constitutionally deficient; and, (2) the deficiency was prejudicial. in *Id.*

Under the first prong, referred to as the "performance" prong, a petitioner claiming that he received constitutionally ineffective assistance of counsel bears the burden of demonstrating that his counsel's representations "fell below an objective standard of reasonableness." *Id.* Since the range of reasonable professional assistance is wide, the burden is a difficult one to overcome. *Id.* As observed by the court in *Atkins v. Singletary,* 965 F.2d 952 (11th Cir. 1992), *cert. denied*, 515 U.S. 1165 (1995), a "heavy measure of deference" is accorded to judgments of defense counsel since "nothing is so easy as to be wise after the event." *Id.* at 958. In that regard,

trial counsel is "strongly presumed to have rendered adequate assistance and made significant decisions in the exercise of reasonable professional judgment." *Strickland,* 466 U.S. at 690. At bottom, the objective "performance prong" is contextual in nature, asking whether defense counsel's actions were objectively reasonable considering all the circumstances. *Id.*

The second prong of the *Strickland* test, known as the "prejudice" prong, is satisfied only if petitioner can show "there is a reasonable probability that, but for the counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.* at 694. Where the claim of ineffectiveness arises in the context of a rejection of plea offer, the prejudice prong requires a showing that but for counsel's erroneous advice concerning the law or the plea, it is reasonably probable that the defendant would have accepted the offer. *Diaz v. United States,* 930 F.2d 832, 835 (11th Cir. 1985) (applying *Strickland* analysis in the "rejection of guilty plea" context). Thus, "[t]he benchmark for judging any claim of ineffectiveness must be whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial [or decision to reject the plea offer] cannot be relied on as having produced a just result." *Strickland,* 466 U.S. at 686.

It is elementary that among the duties a defense counsel owes his client, one of the most basic is "to consult with the defendant on important decisions

and to keep the defendant informed of important developments in the course of the prosecution." *Strickland,* 466 U.S. at 688. Where a plea agreement is offered by the prosecution, the defense attorney is obliged to inform the client about the proposed agreement, and failure to do so constitutes ineffective assistance of counsel. *Diaz,* 930 F.2d at 834; *Johnson v. Duckworth,* 793 F.2d 898, 902 (7th Cir.), *cert. denied,* 479 U.S. 937 (1986). In the instant case it is undisputed that Ortiz was made aware of the prosecution's plea offer to a cap of five years by her attorney, and that this plea offer was rejected.

What Ortiz argues is that the information given her by her attorney regarding her potential sentencing exposure and the jury's likely acceptance or rejection of her defense was so inaccurate and so insufficient that it undermined her ability to make an intelligent decision about whether to accept the plea offer. Thus, the focus here is not on whether the plea offer was ever relayed to Ortiz (we know that it was), but whether the advice related to accepting or rejecting the plea offer was so inadequate as to rise to the level of ineffective assistance. The undersigned concludes that it was not.

Ortiz' primary claim is that her trial counsel afforded her ineffective assistance when he informed her that if convicted she faced a sentence from anywhere from five to ten years, when in fact the sentence Ortiz is serving is 17 ½ years. Ortiz contends that this inaccurate pronouncement of the law led her to decline a plea offer that would have resulted in a

maximum five year sentence instead of the sentence she is presently serving.

The case law does not clearly define how much and what kind of information must be conveyed to a defendant so as to stay within the performance prong parameters of *Strickland.* Several courts, including the Eleventh Circuit, have found ineffective assistance where defense counsel renders unreasonably inaccurate advice regarding the advisability of accepting or rejecting a plea offer. Thus, ineffective assistance has been found in instances where defense counsel grossly underestimated potential sentence exposure, *United States v. Day,* 969 F.2d 39, 43 (3d Cir. 1992) and *United States v. Gordon,* 156 F.3d 376, 380 (2d Cir. 1998), defense counsel inaccurately relayed the law on parole eligibility, *Meyers v. Gillis,* 142 F.3d 664, 667 (3d Cir. 1998), and defense counsel mistakenly informed defendant his state and federal sentences would run concurrently, *Finch v. Vaughn,* 67 F.3d 909, 916 (11th Cir. 1995); *cf. Jones v. United States,* 178 F.3d 790, 794 (6th Cir.1999) (concluding that an attorney who had not been informed of his client's criminal history was not ineffective where he failed to explain that any prior offenses might be used to enhance his client's sentence).

In the instant case, although defense counsel did not advise Ortiz of the statutory maximum penalty, he did advise her, according to her own testimony, that she faced five, possibly ten years in prison, and, according to defense counsel's testimony, as much as twelve years. Faced with this proposition, Ortiz

remained adamant in her innocence and rejected the Government's plea offer of a five year cap. In support of her position that had she known she could have been sentenced to nearly eighteen years in prison, she would have accepted the Government's five year offer, Ortiz offers the affidavit testimony of her husband and daughter. These affidavits do nothing to advance Ortiz' cause. In their affidavits Ortiz' husband and daughter merely state that when discussing with Ortiz the reasons for her decision to reject the Government's five year plea offer, Ortiz stated that although she faced up to ten years in prison if convicted, she believed she wouldn't get more than five years.

Why Ortiz chose to place such an unrealistically positive outlook on her sentence exposure is inexplicable when one considers she was informed by her attorney she could get ten possibly twelve years in prison if convicted, and was present in court when the prosecuting attorney advised everyone present that a conviction after a jury trial would result in a prison sentence of at least 14 years. Clearly, the difference between the at least fourteen years the prosecuting attorney predicted, or even the twelve years her attorney claims he predicted, and the seventeen and one-half years Ortiz actually received is not so great a disparity. Ortiz simply cannot, ostrich-like, stick her head in the sand, try her chances on a long-shot gamble and then, when her gamble doesn't pay off, cry ineffective assistance of counsel claiming, despite

all evidence to the contrary, that she didn't know her sentence exposure was so high.

It is this relatively small range of disparity (the 12 years she was told by her attorney she faced and the "at least" 14 years she heard the prosecutor say she faced verses the 17 ½ years she actually received) which distinguishes Ortiz' case from the cases in which a gross underestimation of sentence exposure has led to a finding of ineffective assistance. Most of the cases in which ineffective assistance has been found based on defense counsel's miscalculation of potential sentence exposure involve a disparity between predicted sentence and actual sentence of somewhere between eighty to one-hundred percent. *See, e.g., U.S. v. Day,* 969 F.2d 39, 42-44 (3d Cir. 1992) (finding ineffective assistance where counsel advised defendant before trial that defendant faced a maximum sentence of 11 years, defendant turned down a plea offer of five years and ended up receiving a twenty-two year sentence upon conviction); *U.S. v. Gordon,* 156 F.3d 376, 377, 380 (2d Cir. 1998) (finding ineffective assistance where the maximum sentence defendant faced after trial was 12 to 17 years greater than the estimate he received from his attorney prior to trial and the sentence actually received was almost double that predicted by defense counsel); *Slevin v. U.S.,* 71 F.Supp.2d 348, 351,355 (declining to find ineffective assistance but stating that defendant's allegations, if true, would amount to ineffective assistance where defendant turned down plea offer of two years, received a six and a half year sentence

after trial, and claimed that his counsel had advised him before trial that he was facing a maximum three year sentence which with good behavior would result in a 12 month sentence); *see also Magana v. Hofbauer,* 263 F.3d 542, 550 (6th Cir. 2001) (counsel's erroneous advice that defendant would "get ten years whether he went to trial or didn't go to trial," whereas he received two consecutive 10-20 year sentences after trial was deficient performance). In this case the difference between the sentence exposure Ortiz knew she faced (at least 14 years as indicated by the prosecutor in her presence or the up to 12 years predicted by her counsel) and the sentence actually received (17 ½ years) ranges from between 39 percent to 46 percent.

Also distinguishing this case from the other cases in which a miscalculation in sentence exposure led to a finding of ineffective assistance, is the fact that here, even if one believes Ortiz' claim that her attorney told her she faced a sentence, at the high end, of 10 years, both she and her husband were present at a hearing in which it was made plain that if convicted she would be facing a sentence of "probably 14 years in prison at least and possibly more."[2] Thus, despite what information was relayed to her by defense counsel, the fact remains she knew she was facing at least 14 years in prison if convicted. The difference

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[2] Transcript of September 19, 2001, Status Conference before Judge Middlebrooks, p.5, attached as Ex. 8 to Ortiz Appendix (D.E. #3).

between the "at least" 14 years predicted and the 17 ½ years she actually received is not so great as to rise to the level of ineffective assistance.

Ortiz additionally claims that defense counsel was ineffective in not reviewing the mechanics of the sentencing guidelines with her and in not realistically conveying to her the weakness of her case and the advisability of accepting the plea offer. These claims are also groundless. Although not directly on point the case of *Goudie v. U.S.*, 323 F.Supp.2d 1320 (S.D. Fla. 2004) (J. Lenard) is instructive. In *Goudie* the District Court reversed a magistrate finding that defense counsel was ineffective when presenting a plea offer to his client for failing to explain how the federal sentencing guidelines would apply to petitioner if he were convicted at trial and for failing to advise petitioner how he should respond the government's plea offer.

The *Goudie* Court began by rejecting petitioner's claim that in presenting a plea offer defense counsel has an obligation to discuss with his client the mechanics of the sentencing guidelines and how those guidelines apply to his case. Unlike defense counsel in this case who, by Ortiz' own account, informed her she faced up to ten years in prison, defense counsel in *Goudie* never informed his client of his possible sentence exposure should he be convicted. The District Court found that while "[c]ertainly, it would have been preferable if [defense counsel] had discussed the Guidelines and Petitioner's possible sentencing exposure under those Guidelines with Petitioner

when presenting the plea offer to him," defense counsel's omissions in this regard did not fall below the "objective standard's of reasonableness" demanded by *Strickland*. 323 F.Supp.2d at 1334. Relevant to the District Court's decision were the twin facts that petitioner was accurately informed of the details of the plea offer which, had it been accepted, would have resulted in no prison time, and knew that, if convicted, he "would be going to prison for a long time." These same facts, but even more pronounced, are present in this case: defense counsel Roo repeated the terms of the plea offer to Ortiz exactly as it had been explained to him by the Government and Ortiz knew that if she didn't accept the plea offer and was convicted she faced a minimum of 14 years in jail. The *Goudie* Court also rejected petitioner's claim that in all instances defense counsel must advise a client whether or not to plead guilty. In so ruling the District Court relied on *Purdy v. U.S.*, 208 F.3d 41, 46 (2d Cir. 2000), which limited the holding of *Boria v. Keane*, 99 F.3d 492 (2d Cir. 1996), a case upon which Ortiz relies, to the facts of that case. In *Boria*, the court was presented with the question of a defense counsel's duty when a defendant's best interests clearly required that a plea offer be accepted. The facts in *Boria* were undisputed that despite defense counsel's unequivocal belief that his client would be convicted at trial, he never recommended his client accept a favorable plea offer, not, and this is significant, because he believed his client was innocent, but because he believed his client would be embarrassed

in front of his children. *Id.* at 496. In *Purdy,* the court rejected a *per* se rule that counsel not only must inform each client of the probable costs and benefits of accepting a plea offer, but also, in so many words and regardless of the circumstances, must advise the defendant to either plead guilty or not. 208 F.3d at 46. The *Purdy* court held that defense counsel was not ineffective for failure to advise a client whether or not he should accept a plea offer where defense counsel had informed the client on several occasions of the strength of the government's case, where the defendant was a sophisticated businessman, who understood the case against him was formidable, where the defendant's best interest did not necessarily demand a guilty plea, and where the defendant's decision not to accept the plea was based on a rational calculation. *Id.* at 46-47.

The facts in the instant case fall clearly within the parameters of *Purdy.* In the case *sub judice* the record is clear that from the very beginning Ortiz was adamant that she was innocent, and that her attorney believed in her innocence. Indeed at the hearing before the undersigned Ortiz testified that in discussing the plea offer with her counsel on the day in question she was adamant about her innocence and in light of such innocence did not know what she could possibly plead guilty to.

The record is also clear that defense strategy from the outset, as discussed with and agreed to by Ortiz, was to base the defense on Ortiz' credibility and integrity. Ortiz was an integral part of this

strategy and at all times was made aware of the strength of the Government's case against her. In fact Ortiz was present in court when her fellow employee, co-defendant Ramirez, chose to accept the Government's plea offer and testified that immediately thereafter she and her attorney sat down to discuss the ramifications of what would surely be testimony against her. After reviewing the facts and evidence, both agreed that Ramirez' testimony would not unduly harm her case. In his Affidavit defense attorney Roo testified that based upon his review of the evidence and Ortiz' convincing explanations regarding same, he believed that a jury would find Ortiz innocent of the charges and acquit. Stella Collazos was a long-term customer of the bank who, as far as Ortiz knew, had never done anything illegal or asked Ortiz to do anything illegal. It was the belief of Ortiz and her counsel that none of the Government witnesses would be able to directly implicate Ortiz in any of Collazo's drug money laundering activities, and that Mr. Kantor, Ortiz' boss and President of the bank, was aware of and approved the types of accounts established by Ortiz. In short, Ortiz' counsel believed Ortiz would be a convincing witness on the stand and that the evidence against her could be satisfactorily explained by her so as not to result in a conviction. Under the circumstances and considering the evidence, this was not a totally unreasonable strategy. The fact that the strategy did not work does not mean that defense counsel was ineffective. *Chandler v. United States*, 218 F.3d 1305, 1317 (11th Cir. 2000) ("[C]ounsel's reliance on particular lines of defense to

the exclusion of others – whether or not he investigated those other defenses – is a matter of strategy and is not ineffective unless the petitioner can prove the chosen course, in itself, was unreasonable.") (*en banc*).

In addition to being adamant about her innocence and fully cognizant of the strengths of the Government's case against her, Ortiz, like the petitioners in *Goudie* and *Purdy,* was a well-educated sophisticated individual with a high powered job. At the time of the plea offer Ortiz had been in this country for over 30 years. Ortiz was employed for most, if not all, of those 30 years, and for at least the last several years was a sophisticated businesswoman maintaining a powerful position in Bankatlantic as Vice President of International Banking. Furthermore, at the time of the plea offer, her daughter, who she admits she was in close contact with throughout the underlying proceedings, was a law student.

It is clear from the foregoing that at the time Ortiz rejected the Government's plea offer she had information about the Government's case against her and understood her defense counsel's reasonable assessment of the strength of that case. Furthermore, it is clear that Ortiz' decision to reject the Government's plea offer was based on her rational calculation that she was innocent and would be acquitted at trial. Under these circumstances defense counsel's failure to advise Ortiz whether she should accept the Government's plea offer was not unreasonable and does not constitute ineffective assistance of counsel.

Even assuming that Ortiz had satisfied the performance prong of the *Strickland* analysis, which this Court finds she unequivocally has not, her claim would still fail as she can not demonstrate that she was prejudiced by her counsel's alleged errors. In order to demonstrate prejudice the burden is on Ortiz to show "there is a reasonable probability that, but for the counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland,* 466 U.S. at 694. In *Strickland,* a "reasonable probability" is defined as "a probability sufficient to undermine confidence in the outcome." *Id.* Where the claim of ineffectiveness arises in the context of a rejection of plea offer, the prejudice prong requires a showing that but for counsel's erroneous advice concerning the law or the plea, it is reasonably probable that the defendant would have accepted the offer. *Diaz v. U.S.,* 930 F.2d 832, 835 (11th Cir. 1985) (applying *Strickland* analysis in the "rejection of guilty plea" context). In these cases it is not sufficient for a petitioner to simply assert that in hindsight he would have accepted a plea offer had it been properly presented to him. *Diaz,* 930 F.2d at 835. Rather, the petitioner must offer the court objective evidence in order to satisfy the prejudice prong of the *Strickland* analysis. *Paters v. U.S.,* 159 F.3d 1043, 1047 (7th Cir. 1998); *Cullen v. U.S.,* 194 F.3d 401, 407-408 (2d Cir. 1999).

In the instant case Ortiz testified that had she been more fully informed as to the effect the Guidelines had on her case and the fact that, if convicted,

she could have received 17 ½ years, she would have accepted the Government's plea offer to a cap of 5 years. As further support, she offers the affidavits of her husband and daughter which essentially mimic Ortiz' claims.

This Court agrees with the Government that these self-serving statements by Ortiz and her family members are belied by the record. Ortiz herself has admitted that even with the knowledge she could get 10 years in prison if convicted, she turned down a plea offer which would have capped her sentence at five years. According to Ortiz, she rejected the Government's offer because of her belief that even if she went to trial and lost, she would still only get the five years. Ortiz' testimony in this regard is simply not credible. While Ortiz' attorney did not specifically discuss with her the minimum and maximum sentences she might receive under the Guidelines upon conviction, he did tell her she was looking at 10 or perhaps 12 years. Moreover, Ortiz was present when the government prosecutor stated in open court that if convicted Ortiz was looking at a prison sentence of at least 14 years. There is little disparity between Ortiz' actual sentence of 17 ½ years and the 14 year sentencing exposure she believed to be in effect at the time she rejected the plea offer. Add to this Ortiz' adamant protestations of innocence throughout the proceedings and extending after conviction, and it's clear to see that Ortiz does not even come close to demonstrating a reasonable probability that she

would have accepted the offer had it been properly presented by her counsel.

In short, the undersigned finds that Ortiz has failed to offer any objective evidence in support of her claim that she would have accepted the plea offer if Roo had more thoroughly explained Ortiz' sentencing exposure under the Sentencing Guidelines upon conviction, or if Roo had advised Ortiz to accept the plea offer. The facts in this case couldn't be any clearer. Defense counsel informed Ortiz of the Government's plea offer and explained its terms. Ortiz made a decision to reject the Government's offer and go to trial based on her belief of her own innocence, her understanding of the case against her, and her attorney's assessment of the strength of the case. She was aware of the five year plea offer and the possibility of a substantial term of imprisonment (at least 10 years by her own testimony, approximately 12 years according to the testimony of her attorney, and a minimum of 14 years, as stated in open court by the prosecutor in the presence of Ortiz and her husband), if convicted. She took a calculated risk which she now regrets and seeks to extricate herself by blaming her attorney who merely accepted his client's rational decision to refuse a favorable plea offer. In light of Ortiz' protestations of innocence and noting the absence of any objective evidence to support Ortiz' claim that she would have accepted the plea offer had her counsel more thoroughly explained her sentencing exposure upon conviction, or if her counsel had advised her to accept the plea offer, this Court finds

no prejudice. Having failed to satisfy both the performance and prejudice prongs of the *Strickland* analysis, Ortiz' Petition, to the extent it seeks relief on the basis of ineffective assistance of counsel, must be denied.

B. Ortiz' Fifth And Sixth Amendment Claims Are Procedurally Barred

Ortiz claims that her sentence must be vacated because she was deprived of her Fifth and Sixth Amendment rights, established in *Blakely v. Washington,* 124 S.Ct. 2531 (2004), to have a jury determine beyond a reasonable doubt all facts legally essential to enhance her Guidelines sentence. According to Ortiz, her Fifth and Sixth Amendment rights were violated by the imposition upon her of a sentence enhanced by factors not charged in the indictment or found by the jury. Ortiz' *Blakely* claim fails, however, for the twin reasons that the claim is not cognizable under the non-retroactivity standards set forth in *Teague v. Lane,* 109 S.Ct. 1060 (1989) and the "cause and prejudice" standards set forth in *United States v. Frady,* 102 S.Ct. 1584 (1982).

1. *Blakely's* Sixth Amendment Holding, Extended To The Federal Sentencing Guidelines In *Booker*, Does Not Apply Retroactively

On January 12, 2005, the Supreme Court clarified a point of contention between the Circuits and

held that the Sixth Amendment holding of *Blakely* applies to the federal Sentencing Guidelines. *United States v. Booker* and *United States v. Fanfan,* No. 04-104 and 04-105, 2005 WL 50108 (U.S. Jan. 12, 2005) (hereinafter "*Booker*"). In so ruling, the Supreme Court went on to note that because the holding of *Blakely* is incompatible with proper implementation of the Federal Guidelines, the Federal Guidelines are not binding upon sentencing courts and instead are only "advisory" in nature; nevertheless, "[t]he district courts, while not bound to apply the Guidelines, must consult those Guidelines and take them into account when sentencing." *Id.* at *27.

Unfortunately for Ortiz, the recent Supreme Court holding in *Booker* does nothing to advance her cause because neither *Blakely* nor *Booker* apply retroactively to cases on collateral review. This is the conclusion recently reached by the Eleventh Circuit in the post-*Booker* decision of *Varela v. United States,* ___ F.3d ___, 2005 WL 367095 *3-4 (11th Cir. Feb.17, 2005). In *Varela* the Eleventh Circuit squarely held that the constitutional rule announced in *Booker* is a "prototypical procedural rule[]" that does not apply retroactively to section 2255 cases on collateral review. *Id.* (quoting *Schiro v. Summerlin,* 124 S.Ct. 2519, 2523 (2002)); *see also, McReynolds v. United States,* ___ F.3d ___, 2005 WL 237642, at *1 (7th Cir. Feb. 2, 2005) (concluding that *Booker* does not apply to cases on collateral review).

In so ruling the *Varela* Court applied the familiar retroactivity analysis enunciated in *Teague v. Lane,*

489 U.S. 288, 311-13 (1989). The *Teague* doctrine bars retroactive application in a §2255 proceeding of any new procedural rule of constitutional law which had not been announced at the time the movant's conviction became final, subject to limited exceptions not applicable here.

In determining whether *Teague* applies to bar a claim, the first question to consider is whether the movant's conviction was final at the time the new rule was announced. Here, Ortiz' conviction became final in 2003, well before the Supreme Court issued its decision in both *Blakely* on June 24, 2004, and *Booker* on January 12, 2005.

The next issue to address is whether the rule announced is "new." In this case there can be no question that the rule announced in *Blakely,* now extended by *Booker* to federal Guidelines cases, is a "new rule." *Varela,* 2005 WL 367095. *Teague* instructs that "a case announces a new rule when it breaks new ground or imposes a new obligation on the State or the Federal Government [or] . . . if the result was not dictated by precedent existing at the time the defendant's conviction became final." 489 U.S. at 301. Clearly no prior decision had "dictated" that a judge could impose sentence "solely on the basis of the facts reflected in the jury verdict or admitted by the defendant" as *Blakely,* as extended by *Booker,* now holds. Indeed, previously well-established precedent held just the opposite. *United States v. Sanchez,* 269 F.3d

1250, 1262 (11th Cir. 2001) (en banc), *cert. denied,* 535 U.S. 942 (2002).[3] It is crystal clear that no "reasonable jurist," based on the case law as it previously stood before *Blakely* and *Booker* were decided, would have felt "compelled" to adopt the rule announced in these cases. As such, there can be no doubt that *Blakely,* as extended in *Booker,* constitutes a "new rule" for *Teague* purposes.

The final question the court must consider is whether the new rule announced is substantive or procedural. Substantive rules generally apply retroactively while procedural rules generally do not. *Schriro v. Summerlin,* ___ U.S. ___, 124 S. Ct. 2519, 2522 (2004). "Substantive rules" are defined as "decisions that narrow the scope of a criminal statute by interpreting its terms . . . as well as constitutional determinations that place particular conduct or persons covered by the statute beyond the State's power to punish." *Summerlin,* 124 S.Ct. at 2522-23 (quoting *Bousley v. United States,* 523 U.S. 614, 620 (1998)) (quoting *Davis v. United States,* 417 U.S. 333, 346 (1974)) (internal quotation marks omitted). The Eleventh Circuit's recent decision in *Varela* is dispositive. There, the Court held that the *Blakely* rule as

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[3] Significantly, it is not a prerequisite that a "new rule" overrule a prior decision. *Salem v. Stumes,* 465 U.S. 638, 649-50 (1984). Indeed, a rule may be "new" even though it finds general support in previously decided cases. Instead the litmus test for a "new rule" is whether, at the time it was decided, a "reasonable jurist" would have felt "compelled" to adopt the rule as stated. *O'Dell v. Netherland,* 521 U.S. 151, 164 (1997).

extended in *Booker* falls squarely under the definition of new rules of criminal procedure that do not apply retroactively. 2005 WL 367095, *3-4.

This view of the *Blakely/Booker* rule being procedural in nature is consistent with the case law establishing that neither *Apprendi v. New Jersey,* 530 U.S. 466, 490 (2000) nor *Ring v. Arizona,* 536 U.S. 584 (2002), which applied the Sixth Amendment component of the rule announced in *Apprendi* to Arizona's capital sentencing scheme, created new substantive rules. *See, e.g., Summerlin,* 124 S.Ct. at 2523-24; *McCoy v. United States,* 266 F.3d 1256 (11th Cir. 2001), *cert. denied,* 536 U.S. 906 (2002). Thus, in *Summerlin* the Supreme court expressly stated that its decision in *Ring,* which held that the Sixth Amendment requires a jury, and not a judge, to determine the existence of aggravating circumstances necessary for imposition of the death penalty, was properly classified as procedural rather than substantive. *Id.* at 2523-24. Likewise in *McCoy* the Eleventh Circuit held that *Apprendi* did not decriminalize any class of conduct or prohibit a certain category or punishment for a class of defendants making the rule announced in *Apprendi* procedural in nature and therefore subject to the *Teague* bar.

Blakely like *Ring,* merely altered the range of permissible methods for determining a defendant's sentence, requiring that a jury rather than a judge find the essential facts bearing on punishment under the Washington State sentencing guidelines. Adding *Booker* to the mix, which applies the *Blakely* rule to

federal Guidelines cases, does not change the fact that *Blakely's* Sixth Amendment holding is not retroactive. *Varela,* 2005 WL 367095 * (11th Cir. Feb.17, 2005). Accordingly, the new rule announced in *Blakely* as extended in *Booker,* is procedural in nature for purposes of *Teague* and does not apply retroactively, thus barring Ortiz' claim .

2. Ortiz Has Failed To Show Cause And Prejudice

Ortiz' *Blakely* claim is further barred by her failure to show, as required by *United States v. Frady,* 456 U.S. 152 (1982), "cause and prejudice" for her failure to assert her claim before the district court or on direct appeal. The record is clear that Ortiz did not advance the argument before the district court that, under the Sixth Amendment, federal Sentencing Guidelines enhancements had to be charged in the indictment and/or presented to the jury for a finding of proof beyond a reasonable doubt. Also clear from the record is that Ortiz did not take a direct appeal on this issue.[4]

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[4] Ortiz' only challenge was to the district court's application of a number of enhancements contained in the Sentencing Guidelines. That challenge was insufficient to preserve a later constitution-based claim. *See U.S. v. Candelario,* 240 F.3d 1300 (11th Cir. 2001).

The failure to raise such issues either before the district court or on direct appeal constitutes a procedural default. *Frady,* 456 U.S. at 170; *Parks v. United States,* 832 F.2d 1244 (11th Cir. 1987); *Sanchez v. United States,* 782 F.2d 928, 935 (11th Cir. 1986). A defaulted claim cannot be heard on collateral review unless the applicant shows "cause" for such failure to raise the claim and "actual prejudice" resulting from the errors he alleges. *Frady,* 456 U.S. at 170.

In this case Ortiz has failed to show "cause" for her failure to have raised the constitutional claim before the district court or on appeal. A defendant must assert all available claims on direct appeal because a §2255 motion is not a surrogate for a direct appeal. *Lynn v. U.S.,* 365 F.3d 1225, 1232 (11th Cir. 2004). Here, Ortiz did not include in her direct appeal any allegation that the application of the sentencing enhancements was foreclosed by the Sixth Amendment and has not alleged that the attorney representing her at sentencing and on appeal was ineffective. Ortiz' attempt to show cause by characterizing the result in *Booker* as novel is unavailing. In *United States v. McCoy,* 266 F.3d 1245 (11th Cir. 2001), a case cited by Ortiz, the Eleventh Circuit held that a movant was procedurally barred from raising an *Apprendi* claim in a section 2255 motion to vacate where the basis of the claim was known at the time of sentencing and appeal even though *Apprendi* had not yet been decided. The same argument applies with equal force to this case. Accordingly, Ortiz has failed to demonstrate cause for failing to raise her Sixth

Amendment claim and is barred from asserting it here.

Even if Ortiz could somehow show "cause" for her failure to raise her Sixth Amendment claim previously, her claim would still be barred for failure to demonstrate "actual prejudice" sufficient to overcome procedural default. Ortiz' claim of prejudice resulting from the court's application of the Guidelines to sentence within the statutory range is unavailing. Although no longer binding, the Guidelines still must be "take[n] into account" in sentencing. *Booker,* 125 S. Ct at 750; *United States v. Wilson,* ___ F. Supp. ___, 2005 WL 78552, at *12 (D. Utah Jan. 13, 2005) (concluding in light of *Booker* that Guidelines should be given heavy weight and departures should be made in only the unusual case and for clearly identified and persuasive reasons). The sentence imposed on Ortiz was pursuant to Guidelines factors which even upon a re-sentencing would be taken into account. The District Court clearly stated that other than the length of the sentence, he saw no reason to depart. Thus Ortiz' prejudice argument is nothing but speculation.

In this regard, the Eleventh Circuit's recent application of the plain error standard of review to a *Blakely/Booker* claim in *United States v. Rodriguez*, ___ F.3d ___, 2005 WL 272952 (11th Cir. Feb. 4, 2005) is instructive. In *Rodriguez*, the court explained that:

> for third-prong error review purposes, [the point] is that the constitutional error whose

> prejudicial measure we take is not the use of extra-verdict enhancements. Their use remains a constitutional part of the guidelines sentencing in the post-*Booker* era. The constitutional error is the use of extra-verdict enhancements to reach a result that is binding on the sentencing judge; the error is the mandatory nature of the guidelines once the guidelines range has been determined. Therefore, in applying the third prong [of the plain error analysis], we ask whether there is a reasonable probability of a different result if the guidelines had been applied in an advisory instead of binding fashion by the sentencing judge in this case. . . . [W]here the effect of an error is uncertain or indeterminate – where we would have to speculate – the appellant has not met his burden of showing a reasonable probability that the result would have been different but for the error; he has not met his burden of showing prejudice; he has not met his burden of showing that his substantial rights have been affected.

Id. at *9-10 (citing *Jones v. United States*, 527 U.S. 373, 394-95 (1999)). Applying the analysis of *Rodriguez* to Ortiz' case shows that she has not shown prejudice under the plain error test, let alone the more stringent prejudice prong of *Frady*.

In summary, this Court finds that Ortiz' §2255 Petition should be denied because she has failed to establish a claim of ineffective assistance of counsel and her Sixth Amendment *Blakely/Booker* claim is

procedurally barred. In accordance with the above and foregoing, it is hereby

RECOMMENDED that Ortiz' Motion to Vacate Judgment Pursuant to 28 U.S.C. §2255 With Request For Evidentiary Hearing (D.E. #1) be **DENIED**.

The parties have ten (10) days from the date of this Report and Recommendation within which to serve and file written objections, if any, with the Honorable Donald M. Middlebrooks, United States District Judge. Failure to file objections timely shall bar the parties from attacking on appeal the factual findings contained herein. *LoConte v. Dugger*, 847 F.2d 745 (11th Cir. 1988), cert. denied, 488 U.S. 958 (1988); *RTC v. Hallmark Builders, Inc.*, 996 F.2d 1144, 1149 (11th Cir. 1993).

RESPECTFULLY SUBMITTED, this 28th day of February, 2005, in Chambers at West Palm Beach, Florida.

/s/ Linnea R. Johnson
LINNEA R. JOHNSON
UNITED STATES
MAGISTRATE JUDGE

CC: Hon. Donald M. Middlebrooks
Russell R. Killinger, AUSA
Jeanne Baker, Esq.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO.
04-21990-CIV-MIDDLEBROOKS/JOHNSON

BLANCA PIEDAD ORTIZ

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

_____/

ORDER GRANTING IN PART AND DENYING IN PART PETITIONER'S MOTION FOR CERTIFICATE OF APPEALABILITY

(Filed Feb. 7, 2006)

THIS CAUSE comes before the Court upon the Petitioner's Motion for a Certificate of Appealability (DE 47). On August 12, 2005, the Court denied Petitioner's Writ of Habeas Corpus pursuant to 28 USC § 2255. The Petition sought to have this Court find that Petitioner's trial counsel was ineffective in his representation of Petitioner because: he never advised her that she should consider a plea agreement offered by the government which would have capped her jail time to five years; he consistently misrepresented the maximum sentence that she would receive as ten to twelve years, but more likely around five; and he negligently failed to recognize the strength of

the government's case against her, and accordingly failed to encourage her to take the offered plea..

The Petition also sought to have various sentencing enhancements stricken pursuant to recent Supreme Court decisions relating to the Sentencing Guidelines and/or issues which must be presented to a jury. *See Blakely v. Washington,* 124 S.Ct. 2531 (2004); *United States v. Booker* and *United States v. Fanfan,* 125 S. Ct. 738 (2005); *Apprendi v. New Jersey,* 530 U.S. 466, 490 (2000).

The matter was referred to Magistrate Judge Linnea Johnson who held an evidentiary hearing and issued a Report & Recommendation which recommended that the Petitioner's Motion be denied on February 28, 2005 (DE 35). The Petitioner filed her Objections to the R&R on June 1, 2005. Upon review of the magistrates report, the Petitioner's Objections thereto, and a *de novo* review of the entire record of the instant case as well as the criminal matter underlying the instant case, the Court found that the comprehensive R&R correctly addressed all but one of the issues presented within the Petitioner's Motion. That issue was whether or not Petitioner's *Booker/ Blakely* claim was able to satisfy the requirement of "actual prejudice" sufficient to overcome the procedural default. The R&R stated that Petitioner's argument was "nothing but speculation" that the trial judge "[h]ad the Sentencing Guideline been advisory

. . . likely would have imposed a lesser sentence."[1] The Court found that such fact, however, at that time, under the law as it existed then, did not affect the outcome of the Petitioner's Motion.

Petitioner now seeks a Certificate of Appealability ("COA"). She requires a COA to proceed with an appeal. *See Hardwick v. Singletary,* 122 F.3d 935, 936 (11th Cir.), *modified on other grounds,* 126 F.3d 1412, 1313 (11th Cir. 1997). "A [COA] may issue . . . only if the applicant has made a substantial showing of the denial of a constitutional right," 28 U.S.C. § 2253(c)(2), and "shall indicate which specific issue or issues satisfy the showing required by [the statute]." *Id.* Before the Court of Appeals may rule on the merits of a petitioner's appeal, the district court must rule on whether to issue a COA. *See Edwards v. United States,* 114 F.3d 1083, 1084-85 (11th Cir. 1997). Further, the scope of review on appeal is limited to such issues. *See Murray v. United States,* 145 F.3d 1249, 1250-51 (11th Cir. 1998).

In regards to Petitioner's ineffective assistance of counsel claim, the Court finds that the issues raised by Petitioner do not entitle her to a certificate of appealability from this Court because the Petitioner has not made a "substantial showing of the denial of a constitutional right," under 28 U.S.C. § 2253(c)(2);

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[1] Accordingly, should the Supreme Court or the Eleventh Circuit deem *Booker/Blakely* to be subject to retroactive application, the Court would find re-sentencing appropriate.

that is, she has not demonstrated that the issues are "debatable among jurists of reason; that a court could resolve the issues [in a different manner]; or that the questions are adequate to deserve encouragement to proceed further." *Barefoot v. Estelle*, 463 U.S. 880, 893 n. 4, 103 S. Ct. 3383, 3394, 77 L. Ed. 1090.

However, the Court finds that Petitioner's *Booker/Blakely* claim may present a question which is "adequate to deserve encouragement to proceed further. Accordingly, it is

ORDERED and ADJUDGED that Petitioner's Motion for Certificate of Appealability is GRANTED in PART as to her *Booker/Blakely* claim and DENIED in PART as to her ineffective assistance of counsel claim.

DONE and ORDERED in Chambers, at West Palm Beach, Florida this 7th day of February, 2006.

/s/ Donald M. Middlebrooks
DONALD M. MIDDLEBROOKS
UNITED STATES DISTRICT JUDGE

Copies to: Russell R. Killinger, AUSA
Jeanne Baker, Esq.

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 05-15798-A

BLANCA PIEDAD ORTIZ,

Petitioner-Appellant,

versus

UNITED STATES OF AMERICA,

Respondent-Appellee.

Appeal from the United States District Court for the Southern District of Florida

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(Filed Aug. 1, 2007)

Before: **TJOFLAT**, **WILSON** and **PRYOR**, Circuit Judges.

BY THE COURT:

Appellant has filed a motion for reconsideration of this Court's order dated May 30, 2007, denying a motion for expansion of the certificate of appealability ("COA"). Upon reconsideration, appellant's motion for expansion of the COA is DENIED because she has failed to make a substantial showing of the denial of a constitutional right. *See* 28 U.S.C. § 2253(c)(2); *Strickland v. Washington,* 466 U.S. 668, 687, 104 S.Ct. 2052, 2064, 80 L.Ed.2d 674 (1984); *Coulter v. Herring,* 60 F.3d 1499, 1504 (11th Cir.1995).